Tan Ah Tah Ag.C.J. and **Buttrose J.** concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Rodyk & Davidson.*

YAACOB v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong F.J. and Abdul Aziz J.) September 23, 1965]

[K.L. — Federal Court Criminal Appeal No. 45 of 1965]

Criminal Law and Procedure — Trial — Confession by accused — Admissibility of — Question whether statement is free and voluntary — Question of fact for jury — Penal Code s. 302 — Criminal Procedure Code (Cap. 6) s. 224 (i) (a).

Evidence — Admissibility of — Confession — Whether statement free and voluntary — Fact for jury to decide.

The appellant had been convicted for murder under section 302 of the Penal Code. The main part of the prosecution evidence consisted of a confession alleged to have been made voluntarily by the appellant. The magistrate who recorded the confession was called and gave evidence. After that the judge listened to argument by counsel on the question of admissibility in the absence of the jury. The jury were then recalled into court, the confession was produced and admitted and it was read. Counsel for the appellant then asked to be allowed to call the accused to give evidence regarding the making of the confession but this application was refused. In his summing up the judge told the jury that he had admitted the confession because he was fully satisfied that it was made voluntarily. The jury were not told that they were entitled to their opinion of the way in which the confession had been obtained.

Held: (1) although the question of admissibility of evidence is for the judge and not the jury to decide, the question whether a statement is free and voluntary is a question of fact and must be decided on the evidence both that tendered by the prosecution and that, if any, tendered by the accused;

(2) the accused person is entitled to have the verdict of the jury on the weight and value of the confession and therefore if the confession is admitted the jury should hear the evidence so as to enable them to form their opinion on the way in which it had been obtained;

(3) in this case there had been such a disregard of the ordinary way in which criminal proceedings are conducted that the conviction could not stand.

Cases referred to:—

(1) *R.* v. *Murray* 34 Cr.App.R. 203.

(2) *R.* v. *Cowell* [1940] 2 K.B. 49.

(3) *R.* v. *Chadwick* 24 Cr.App.R. 138.

(4) *R.* v. *Francis and Murphy* 43 Cr.App.R. 174, 176.

FEDERAL COURT.

D. D. Chelliah for the appellant.

Syed Hassan (Deputy Public Prosecutor) for the respondent.

Thomson L.P.: This appellant was prosecuted for murder in contravention of section 302 of the Penal Code. He was convicted for culpable homicide not amounting to murder in contravention of section 304 and sentenced to six years' imprisonment.

Against that conviction he has now appealed.

We only find it necessary to deal with one of the grounds of appeal.

The matter arises in this way. The main part of the prosecution evidence consisted of a confession alleged to have been made voluntarily by the appellant. There was some other evidence but substantially the case for the prosecution rested on the confession and without it there was insufficient evidence to support a conviction.

It was the prosecution case that the confession was admissible because it was voluntarily made to a magistrate and this was supported by the evidence of the magistrate who recorded it.

The defence case was that it was inadmissible because the appellant had been induced to make it by tortures previously inflicted on him by two Chinese detectives, neither of whom was called as a prosecution witness. In fairness to the magistrate it should be made clear that there was no reflection of any sort on his conduct.

The magistrate was called and gave his evidence as to the events leading up to the making of the confession and he was cross-examined, all in the presence of the jury. The jury then withdrew while the judge listened to argument by counsel on the question of admissibility. He then stated:—

> "I am fully satisfied that the magistrate took every reasonable precaution to satisfy himself that the statement to be made by accused was voluntary."

That may well be true but it was not, of course, the answer to the question in issue which was whether the trial judge (and not the magistrate) was satisfied that the statement was voluntary. Nevertheless the jury were recalled into court, the confession was produced and admitted and it was read.

Counsel for the appellant then asked to be allowed to call the accused at that stage to give evidence regarding the making of the confession, basing his application on the case of *Murray*.[1] The application was refused and the case proceeded.

At the close of the case for the prosecution the appellant gave evidence on affirmation denying that he had committed the offence charged against him and explaining the confession as not being true and having been the result of tortures inflicted upon him.

In the course of his summing-up the judge dealt with the confession and told the jury he had admitted it because he was fully satisfied that it was made voluntarily. And although he did ask the jury in a rhetorical sort of way

whether they thought that the particular magistrate would have gone on with the taking of the confession if the accused had said to him that he was forced to make it (which had never been suggested), he then proceeded to deal with the question of the truth of the confession by telling the jury that they should deal with it by examining the confession in the light of the other evidence. They were not told that in that connection they were entitled to their opinion of the way in which the confession had been obtained.

In our view what was done was wrong.

The question of admissibility of evidence is for the judge and not the jury to decide (Criminal Procedure Code, section 224(i)(a)). Where this calls for a decision as to whether the statement is free and voluntary a question of fact is involved and that question must be decided, like any other question of fact, on evidence. And to decide it the judge must listen not only to any evidence tendered by the prosecution but also to any evidence relating to the issue tendered by the defence, including if tendered the evidence of the prisoner, (see *R.* v. *Cowell*).[2] That evidence must be heard in the absence of the jury, (see *Chadwick*).[3] The point is dealt with thus by Parker L.C.J. in the case of *Francis and Murphy*:— [4]

"It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) edition of *Archbold's* Criminal Pleadings, etc., at paras. 1114 and 1115. 'The proper course,' it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession."

From the proposition that the accused person is entitled to have the verdict of the jury on the weight and value of the confession it clearly follows that if the confession is admitted the jury should hear the evidence which thitherto the judge alone has heard. Then counsel for the defence should be allowed to cross-examine the prosecution witnesses over again in the presence of the jury and in due course, if so desired, to call the prisoner to repeat his evidence.

As was said by Lord Goddard in the case of *Murray, supra,* (at p. 207):—

"Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained."

And his Lordship said a little later:

"This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury."

In our view in the present case there has been such a disregard of the ordinary way in which criminal proceedings are conducted that the conviction cannot stand. The question of the appellant's criminal responsibility is to be tried in the right and usual manner and that has not been done.

We accordingly quash the conviction and order a retrial on the original charge.

Conviction quashed; retrial ordered.

Solicitors: *R. R. Chelliah Bros.*

DEPUTY PUBLIC PROSECUTOR v. TAN BIAN OUN

[A.Cr.J. (Buttrose J.) September 29, 1965]

[Singapore — Magistrate's Appeal No. 43 of 1965]

Gaming — Betting — Bookmaking — Possession of documents or articles relating to business of bookmaking — Whether necessary to prove that person can continue to be a bookmaker — Whether time essence of charge — Betting Ordinance, 1960, ss. 5(3)(a) and 8.

The accused had been charged with the offence of acting as a bookmaker under section 5(3)(a) of the Betting Ordinance. The learned magistrate acquitted the accused, as he held that time was the essence of the charge, and as the races to which documents found on the accused related had been run he could no longer be a bookmaker in respect of them. The Deputy Public Prosecutor appealed.

Held: (1) the section refers to the possession of documents or other articles which are used or appear to have been used or intended to be used for bookmaking and once possession of the documents is established the time factor is immaterial and irrelevant and the person found in possession is presumed to be a bookmaker;

(2) in this case there were other unsatisfactory features of the case which made it unsafe to convict and therefore the appeal must be dismissed.

MAGISTRATE'S CRIMINAL APPEAL.

Mrs. Quek Bee See (Deputy Public Prosecutor) for the appellant.

S. R. Chapkhana for the respondent.

Buttrose J.: This was an appeal by the Deputy Public Prosecutor against an order of acquittal of the tenth magistrate in respect of a charge against the respondent of acting as a bookmaker under section 5(3)(a) of the Betting Ordinance, 1960 (No. 30 of 1960).

I agreed with the decision of the learned magistrate but not for the same reasons and dismissed the appeal.